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No. 82-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

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REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I. THIS CASE IS ABOUT INDIVIDUAL EMPLOYEES.

There is a misconception running throughout Appellee's brief as to what this case is about. This is not an instance of a publishing company resisting jurisdiction in a state in which it has distributed copies. *Cf. Keeton* v. *Hustler Magazine, Inc.*, No. 82-485. The publisher here consented to jurisdiction in California. Contrary to what Appellee says, Appellants are not arguing for "creation of a diplomatic immunity or jurisdictional privilege," nor is this an instance of "[t]he media's desire to avoid facing the music." Brief for Appellee at 10, 12. The Na-

tional Enquirer consented to jurisdiction.[1] It is actively defending the case.[2]

The issue in this case is whether *individual employees* can be forced to defend *themselves personally* in a distant forum, when the plaintiff already can obtain a complete remedy against the publisher. The issue is not whether the National Enquirer had sufficient contacts with California to support personal jurisdiction. The issue is whether individual employees did.

The damages sought by Appellee here are for publication and distribution of an allegedly libelous article. J.A. 7-10. Appellants did not publish or distribute the article; their employer, the National Enquirer, Inc., did. It is their employer which realizes any profits from publishing activities.

All that Appellants claim here is the established right of an individual defendant to have jurisdiction analyzed according to the standards of federalism and fairness

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[1] Appellee's reference to the Chief Justice's concurring opinion in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), does not support Appellee's argument. The Chief Justice there wrote that the Press Clause of the First Amendment, as contrasted with the Speech Clause, should not be read to give unique rights to institutional media corporations, as opposed to individuals. In the present case appellants are individuals, not a publisher, and no special claims are made uniquely under the Press Clause. Moreover, the Chief Justice recognized that in particular situations the First Amendment may alter the calculus of rights: "It may be that a nonmedia corporation, because of its nature, is subject to more limitations in political expression than a media corporation whose very existence is aimed at political expression." 435 U.S. at 797 n.1 (Burger, C. J., concurring).

[2] It is not at all clear that mere circulation of newspapers in a state through an independent distributor suffices to establish extraterritorial jurisdiction over a publishing company. See, *e.g.*, *Breckinridge* v. *Time, Inc.*, 253 Miss. 835, 179 So.2d 781 (1965); *cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 264 n.4 (1964). But because the National Enquirer consented to jurisdiction and entered a general appearance, that is not an issue in this case.

and contacts *of that defendant* that the Due Process Clause requires. That analysis includes giving weight to important substantive policies, see, *e.g.*, *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), and those important substantive policies most certainly do not exclude the First Amendment.[3] Jurisdictional analysis, this Court has held, must give due regard to

> "the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980).

II. NONE OF APPELLEE'S THREE THEORIES FOR JURISDICTION IS SOUND.

This case boils down to three proposed theories on which Appellee claims extraterritorial jurisdiction. None has ever been applied by this Court to permit extraterritorial jurisdiction in a case like the present one, and none should be.

1. Appellee has proposed only one theory to support personal jurisdiction of the California court over Calder. All that Calder did with respect to the preparation of the article complained of was approve an evaluation and read the story in final proofs, the same way he normally reads everything printed in each week's edition. J.A. 17, 27-28. Appellee's brief concedes that "Calder . . . admittedly will be subject to jurisdiction only if this Court accepts the 'effects principle' . . . ." Brief for Appellee at 26.

To the extent that there is such a thing as an "effects principle," it is heavily qualified, it has never been

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[3] Similarly, in the discovery context a court "in supervising discovery in a libel suit by a public figure . . . has a duty to consider First Amendment interests as well as the private interests of the plaintiff." *Herbert* v. *Lando*, 441 U.S. 153, 178 (1979) (Powell, J., concurring).

adopted by this Court, and it has been explicitly rejected by this Court when applied mechanically. *Kulko v. Superior Court*, 436 U.S. 84, 96 (1978).

As the only authority for asserting extraterritorial jurisdiction over Calder in these circumstances, Appellee relies on § 37 of the *Restatement (2d), Conflict of Laws*, and a number of "effects" cases having varying facts, none of them involving First Amendment claims. But this Court has already rejected such an unqualified assertion of automatic jurisdiction. In *Kulko* v. *Superior Court*, *supra*, this Court emphasized that "it is apparent that the California Supreme Court's reliance on Appellant's having caused an 'effect' in California was misplaced." 436 U.S. at 96. This Court went on to discuss § 37 of the *Restatement*, noting that "this provision is not binding on this Court," and that even by its own terms "the Restatement recognizes that there might be circumstances that would render 'unreasonable' the assertion of jurisdiction over the nonresident defendant." *Ibid.* See also *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). And indeed, the *Restatement* itself has stopped short of endorsing "effects" as the formula when First Amendment considerations are present:

> "**Caveat:**
>
> "The Institute expresses no opinion whether in situations where the interests of the defendant are protected by the First and Fourteenth Amendments of the Constitution, it is necessary that a State have a more substantial basis for the exercise of judicial jurisdiction over a non-resident defendant than would otherwise be required.
>
> • • • •
>
> "d. *Comment on the Caveat*: An action for defamation is an example of an action which may affect interests of the defendant that are protected by the First and Fourteenth Amendments of the Constitution. For a State to have judicial jurisdiction over a non-resident defendant in actions of this sort, it may be that the defendant must have a closer relationship to the State, or have caused effects in the State of a

more substantial nature, than would otherwise be required." RESTATEMENT (2D), CONFLICT OF LAWS, at 156, 159 (1971).

See also *Graciette* v. *Star Guidance, Inc.*, 66 F.R.D. 424 (S.D.N.Y. 1975); *Riverhouse Pub. Co.* v. *Porter*, 287 F.Supp. 1 (D.R.I. 1968).

2. An additional theory that Appellee advances for jurisdiction over South alone is that he visited California on several occasions (he estimated more than twenty times over the course of four years, J.A. 32; a friend of his estimated more than six but less than a dozen times per year, J.A. 66)—*all on business unrelated* to the story in question. There is no authority whatsoever to support a theory of jurisdiction on that basis. The case law is clear that there are two bases on which a corporation may become subject to suit in a distant state. One is by doing business in that state, which makes the corporation subject to suit there by anyone about anything—general jurisdiction. The other is by having sufficient contacts with the state to make the corporation subject to suit there *on a cause of action arising out of those contacts.* See *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

South was not an entity doing business in California; no one has ever claimed he was, and even the court below conceded that "it is clear that California does not have general jurisdiction over defendants Calder and South." J.A. 112. Therefore jurisdiction over him must be based, if at all, on any contacts he had with California *in connection with the article complained of.* And on that point, the record is undisputed that he never visited California even once in connection with this article.[4]

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[4] South's uncontradicted affidavit states that he did not. J.A. 19; see also J.A. 90-91. There is no evidence in the record from any source that says he did, and the burden of proof is on Appellee. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). The trial court's speculation that he might have made one visit to investigate the article was not supported by any evidence and therefore can be disregarded. See Brief for Appellants at 16 n.19. The point is not crucial, because the trial court acknowledged that a single visit to investigate would not be enough to support jurisdiction, anyway. J.A. 94.

3. The final theory that Appellee proposes is that South's making long-distance telephone calls into California gives California jurisdiction. Such a theory if accepted, of course, would spell the end of all restrictions on jurisdiction now imposed by the Commerce Clause and the Due Process Clause. Lower courts have not hesitated to reject it. See, *e.g.*, *Thos. P. Gonzalez Corp.* v. *Consejo Nacional de Produccion*, 614 F.2d 1247, 1254 (9th Cir. 1980); *McBreen* v. *Beech Aircraft Corp.*, 543 F.2d 26 (7th Cir. 1976). To apply such a theory to newsgathering telephone calls would, besides violating due process and Commerce Clause protections, unduly inhibit First Amendment activity as well. The tort of libel consists in publication, not in gathering information, and indeed gathering information is a constitutionally protected activity. See, *e.g.*, *Virginia State Bd.* v. *Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972).

The only authority which Appellee cites for a proposed new holding by this Court that newsgathering is tortious involved an unusual instance where the telephone call itself constituted the defamation, in a suit for business slander and antitrust violations, and also where the call was to law enforcement officials within the forum state invoking their assistance. *Brown* v. *Flowers Industries, Inc.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1275 (1983); *contra*, *e.g.*, *McBreen* v. *Beech Aircraft Corp.*, *supra*; *Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973); see also *Barnstone* v. *Congregation Am Echad*, 574 F.2d 286 (5th Cir. 1978). Whether or not that case was correctly decided, its facts are so different that it certainly is not pertinent here. Other cases Appellee cites involved suits on contracts or for various fraudulent or other improper business practices conducted by mail or wire, and generally involving companies rather than employees; they do not speak to the very different interests at stake in a defamation suit brought personally against the employees of a publisher.

4. Appellee's discussion of the fiduciary shield doctrine ignores some important distinctions. Courts have applied the fiduciary shield doctrine in two distinct situations. In one, the employee enters the state and commits a tort there while on his employer's business. In the other—as here—the employee never enters the state at all. Criticism of the doctrine has focused on the former situation, rather than the latter. It is only the latter that is involved here.

Appellee hypothesizes the case of an out-of-state attorney who negligently injures someone while visiting on a client's business. Brief for Appellee at 45 n.55. In such a case, the employee of course should be personally subject to the state's jurisdiction, on principles as old as *Hess* v. *Pawloski*, 274 U.S. 352 (1927); *cf. Wilbourn* v. *Mostek Corp.*, 537 F. Supp. 302 (D. Colo. 1982). But he should not be if, as here, he never enters the state at all and does whatever he does, as Appellee concedes, J.A. 8, in the course and scope of his employment.

5. Appellee argues that because the First Amendment provides some substantive defenses in libel actions, it should be ignored in jurisdictional analysis. But cases like *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), show that that is a *non sequitur*. It also ignores practicality. If the very fact of having to defend a lawsuit in a foreign forum were not recognized as burdensome in itself, courts would not have to bother to apply the Fourteenth Amendment's due process guarantee to limit extraterritorial jurisdiction.[5]

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[5] Appellee's surprising assertion that "the additional cost of litigating in a distant forum is comparatively small when compared to the costs of litigating a libel matter at all," Brief for Appellee at 18, of course cuts two ways. If the additional cost is so negligible, Appellee might sue in Florida. But in fact, cost is only one advantage a plaintiff suing at home would have over a foreign editor or reporter. See, *e.g.*, Note, *Developments in the Law—State-Court*

Moreover, even apart from the added expense of having to defend in a distant state, the decision as to forum is more than academic for these two Florida residents. Choice of law rules are loose enough that a different forum may mean a different rule of law. California has applied its own law to interstate defamation cases brought by local plaintiffs, and under California law as recently interpreted, punitive damages for defamation may be awarded merely on a showing of "conscious disregard for the rights of others." *Burnett* v. *National Enquirer, Inc.*, 144 Cal. App. 3d 991, 1009, 193 Cal. Rptr. 206, 216 (1983). Florida law, however, does not permit punitive damages for libel unless the plaintiff proves "ill will, hostility, evil intention to defame and injure." *Montgomery* v. *Knox*, 23 Fla. 595, 606, 3 So. 211, 217 (1887). A Florida court might well apply its own law with respect to punitive damages, reasoning that that issue is procedural, *cf.* RESTATEMENT (2D), CONFLICT OF LAWS §§ 121 *et seq.*, or because punitive damages peculiarly implicate local public policy. See RESTATEMENT (2D), CONFLICT OF LAWS § 171, comment *d*; *cf. James* v. *Powell*, 19 N.Y.2d 249, 22 N.E.2d 741, 279 N.Y.S.2d 10 (1967). Whether a Florida court would apply California law even as to liability is uncertain, because the Supreme Court of Florida recently explicitly abandoned the rule of *lex loci delicti* for tort cases. *Bishop* v. *Florida Specialty Paint Co.*, 389 So.2d 999 (Fla. 1980).

Jurisdiction, 73 HARV. L. REV. 909, 911 (1960); *Michigan C.R.R.* v. *Mix*, 278 U.S. 492, 495 (1929).

Judge Bork writing for the U.S. Court of Appeals for the District of Columbia Circuit recently noted that libel suits because of "the risks and high costs of litigation may lead to undesirable forms of self-censorship" and "should be controlled so as to minimize their adverse impact upon press freedom." *McBride* v. *Merrell Dow and Pharmaceuticals, Inc.*, No. 82-1786 (D.C. Cir., Sept. 27, 1983), slip op. at 13.

III. APPELLEE'S BRIEF CONTAINS INACCURACIES.

1. Appellee's treatment of the record is troubling. For example, in the court below Appellee made much of the fact that Appellant South had telephoned Appellee's husband, Mr. Ingels, and read him a draft of the article; Appellee argued, and succeeded in persuading the court below, J.A. 116, that this long-distance telephone conversation with Ingels was an independent and sufficient basis for personal jurisdiction over South. However, Ingels no longer is a party to this case. 103 S. Ct. 2426 (1983). Yet Appellee continues to claim that that call is a basis for jurisdiction, see Brief for Appellee at 26—and now several times asserts or implies that South's conversation was *with Appellee.*

Thus after conceding on page 1 that the conversation was with Mr. Ingels (as Mr. Ingels admitted, J.A. 78, and as the courts below found, J.A. 94, 116), at page 2 Appellee's brief nevertheless refers to "South's telephone call *to Appellee.*" At page 24 it asserts that "South with Calder's presumed knowledge, *called Appellee* and her husband before publication, read the article . . . ." At page 26 it says that South "*telephoned Appellee* and her husband to read *them* the article before publication, thereafter wholly ignoring *their* protests of falsity." At page 3 it refers to "the above-described *telephone call to Appellee* and her husband." (Emphasis in all instances supplied.) Although we differ with Appellee's belief that that telephone call ever had any jurisdictional significance, these four misstatements of the record exceed the tolerable limit.

For another example, Appellee's brief states that "In conducting his 'investigation' of the story, he [South] had many telephone conversations with persons in California (J.A. 115) . . . ." Brief for Appellee at 3; see also *id.* at 26. But J.A. 115, which is cited as authority for the assertion in the brief, is not a citation to the evidence at all; it is a citation to the opinion of the court below. And

all that the court below there says is that South "gathered information appearing in the allegedly defamatory article in the course of at least one visit made by him to California and telephone calls which he made to the state." J.A. 115. The court did not say that he had "many" telephone conversations concerning the article.[6]

As another example, Appellee's brief states that it is "inferable" that Appellant Calder "discussed South's call approvingly with South and others both before and after it was made." Brief for Appellee at 2. There is no basis or evidence whatsoever for any such inference in the record, and there was no such finding by anyone. Again, we believe that the point is of no jurisdictional significance, but Appellee's representation certainly misstates the facts of record.[7]

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[6] On the same page of Appellee's brief, this Court is told that South had twenty to twenty-five conversations with John Robert Lucas, a source. Brief for Appellee at 3. What Appellee does not say is that these conversations were not indicated to be about this story. See J.A. 35-36. In fact, as is set forth with appropriate record citations in our opening brief, the record shows only four telephone calls to California by South that had to do with the article complained of. Brief for Appellants at 5. In addition, Lucas subsequently testified (after the ruling below) that he did have one long-distance telephone call with South concerning the article. See Appendix B to Brief for Appellants. (We believe it appropriate to have informed the Court of that additional call in which South participated, even though it was not in the Joint Appendix, lest we have understated the number of calls conceded to have occurred. Contrary to the vague assertion on page 4 of Appellee's brief, we are not aware of any other post-record "jurisdictionally significant information.")

[7] Appellee's statement of the facts of record also alleges, as if it were a part of this case, that "the published story also contained numerous defamatory statements about Mr. Ingels." Brief for Appellee at 1. However, in the trial court Appellee on April 28, 1983, filed a verified amended complaint that supersedes the one reproduced at J.A. 7-14 and *specifically excludes* any claim that the statements about Mr. Ingels were defamatory. A copy of that amended complaint has been lodged with the Clerk for the Court's

2. Appellee's treatment of the case law also does not always bear scrutiny. For example, Appellee's brief attempts to distinguish *McCabe* v. *Kevin Jenkins & Associates, Inc.*, 531 F. Supp. 648 (E.D. Pa. 1982), by describing that case as "turning on the narrower long-arm statute of Pennsylvania." Brief for Appellee at 22 n.24. No authority for that description is cited. Yet it could not be clearer that (1) the Pennsylvania statute is not "narrower," but rather is coextensive with due process;[8] and (2) *McCabe* was explicitly a constitutional holding. It is clear because the *McCabe* court took pains to say so:

> "Because the Pennsylvania statute extends jurisdiction to the fullest extent permitted under the Constitution, however, the only inquiry required is whether assertion of jurisdiction over KJAI is consistent with the due process standards set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny. I therefore proceed immediately to the constitutional question." 531 F. Supp. at 649-50 (footnote omitted).

Appellee's latest misdescription of that case to this Court is the more troubling because when Appellee earlier made the identical mistaken assertion to this Court, we took the trouble to point out the error by quoting the language above. See Brief Opposing Motion To Dismiss or Affirm, at 3 n.1. Nevertheless, Appellee's brief now simply repeats the original assertion.

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information. *Cf. Fusari* v. *Steinberg*, 419 U.S. 379 (1975); *id.* at 390 (Burger, C.J., concurring). Like the original complaint, the amended complaint alleges both that Appellee's reputation always has remained good and that it has been damaged.

[8] The statute itself explicitly says so. See 42 PA. CONSOL. STAT. ANN. § 5322(b) (Purdon, 1981):

> "the jurisdiction of the tribunals of this Commonwealth shall extend to all persons . . . to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States."

In another instance, Appellee's brief asserts, at 19, that "the *Connor* case [*New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966)] has itself been limited and qualified by subsequent Fifth Circuit opinions." That is an impossible reading of the Fifth Circuit position in light of *Edwards* v. *Associated Press*, 512 F.2d 258 (5th Cir. 1975), the most recent Fifth Circuit decision on this point. *Edwards* held that "when a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed," and "we reaffirm the First Amendment protections we have woven into our prior *in personam* jurisdictional analysis . . . ." 512 F.2d at 266, 268. But even more odd is the fact that on the facing page of their brief, Appellee's counsel attempt to dismiss an unpalatable recent Eleventh Circuit holding by saying that "it considered itself bound by 'applicable law previously developed in the former Fifth Circuit.' " Brief for Appellee at 18 n.19, quoting *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937 (11th Cir. 1982). Thus Appellee on page 19 says that weighing First Amendment considerations is a practice the Fifth Circuit after 1966 "limited and qualified;" but on page 18 Appellee says that in 1982 in weighing the First Amendment, the Eleventh Circuit was merely following the established Fifth Circuit rule (which it was). Appellee cannot have it both ways.[9]

As a final example, Appellee in discussing the Commerce Clause says that *Froning & Deppe, Inc.* v. *Continental Illinois Bank & Trust Co.*, 695 F.2d 289 (7th Cir. 1982), "is also inapposite, for it is a due process case not even mentioning the Commerce Clause." Brief for Appellee at 48. *Froning & Deppe* did rest on due process. But what that case also says is:

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[9] In another instance, Appellee states that *Kinstler* v. *Saturday Evening Post Co.*, 507 F. Supp. 113 (S.D.N.Y. 1981), was "a libel action." Brief for Appellee at 41. *Kinstler* was not a libel action at all. It was a suit by an artist for unauthorized publication of a copyrighted portrait.

> "Most importantly, however, as the district court found, maintenance of personal jurisdiction over South Story in this case would positively *hinder* the underlying policies of the several states which favor the free flow of commerce and of interstate banking transactions in particular. Upholding jurisdiction here on either Valley National's 'foreseeability' theory or its 'benefit and protection' theory would have the result of subjecting a bank to suit in any state from which a check cashed by one of its customers might originate, and would more broadly potentially subject anyone who did business with a large national corporation to suit in any state in which the corporation did business, irrespective of the individual's contacts with that state. Plainly, such a result would wreak havoc upon the orderly conduct of interstate business.
>
> "Valley National attempts to understate the chilling effect of a ruling in its favor." 695 F.2d at 294 (emphasis in original).

And Appellee's attempt on the same page to distinguish the leading Commerce Clause case of *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956), Brief for Appellee at 48, is simply incomprehensible.[10]

3. Appellees' treatment of the secondary authorities is selective at best. Appellee notes that Judge Weinstein and Professor Leflar endorsed the recognition of First Amendment considerations prior to *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Brief for Appellee at 19. Appellee cites three student notes from 1967 that took a view contrary to that of those writers. *Id.* at 21 n. 23. But Appellee makes no response to the leading post-*New York Times* law review discussion of this point,

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[10] The adverse impact of interference with commerce from jurisdictional overreaching is underscored by the Solicitor General in the pending case of *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, No. 82-1127. See Brief for the United States as Amicus Curiae, *passim*.

cited in Appellants' opening brief, which observed, referring specifically to those student notes:

> "Criticism of the kind described is unlikely to serve its intended purpose of promoting more 'principled' decision-making; it is more likely to have quite the opposite effect. Failure to give explicit recognition to the impact of a decision on substantive interests tends to hinder our understanding, to promote the use of fiction, and to complicate the task of the advocate seeking to assist the court in making direct confrontation with the issues." Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 243 (1967).

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Personal jurisdiction is one of those peculiar areas in which only this Court is in a reliable position to keep state claims of power from reaching too far beyond their respective borders. The normal restraints provided by the electoral process are of limited avail when the interests threatened are those of nonresidents and of the system as a whole, and when the claims of local plaintiffs seem appealing.[11] *Cf. Nippert v. City of Richmond*, 327 U.S. 416, 434 (1946); P. FREUND, *Umpiring the Federal System*, in THE SUPREME COURT OF THE UNITED STATES 102-103 (1961); Ottonello, *California's Convenience-Oriented Approach to Personal Jurisdiction: A Critical Review*, 13 LINCOLN L. REV. 21 (1982). As in *World-Wide Volkswagen Corp. Woodson*, 444 U.S. 286, 293-94 (1980), this Court is asked to apply the policies of the national Constitution once again.

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[11] The trial court recognized that "the principal practical effect of holding the individual defendants as parties to this lawsuit would be to facilitate plaintiffs' claims for punitive damages against the individuals," J.A. 96-97—in other words, to impose punishment on persons from another state.

CONCLUSION

For the reasons stated herein and in Appellants' opening brief, the judgment should be reversed.

Respectfully submitted,

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